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No. 15-1251

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SW GENERAL, INC.,
D/B/A SOUTHWEST AMBULANCE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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QUESTION PRESENTED

The Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 *et seq.*, provides that when a presidentially appointed government post requiring Senate confirmation [PAS] becomes vacant, certain individuals may temporarily perform the duties of that post in an acting capacity.

Section 3345(a)(1) of the FVRA, which establishes the default rule for filling such vacancies, provides that "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." Alternatively, the President may designate either "a person who serves in [another PAS post]" under § 3345(a)(2) or a Government employee who has worked for at least 90 days at a pay rate of GS-15 or higher under § 3345(a)(3) to temporarily perform the duties of that post in an acting capacity.

Section 3345(b)(1) further limits the circumstances under which a person may continue to serve as the acting officer for a vacant office after being nominated by the President to the permanent position, providing that such "a person may not serve as an acting officer for an office under this section" unless that person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy.

The question presented is whether the limitation for permanent nominees under § 3345(b)(1) applies to all temporary officers serving under § 3345(a), or whether it applies only to first assistants who take office under § 3345(a)(1).

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Black's Law Dictionary (10th ed. 2014) 10, 12

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INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF frequently participates in original and amicus litigation to prevent the accumulation of power in any one governmental branch in violation of the Constitution's careful separation of powers. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016), *reh'g denied*, July 20, 2016.

Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici believe that the Senate's advice-and-consent function provides a vital check on runaway

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and letters of consent are on file with the Clerk.

executive overreach in our constitutional system. After many years of such overreach, Congress sought to preserve the Senate's important advice-and-consent prerogative by enacting the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 *et seq.*, which prevents the President from permanently installing his chosen replacements as "acting officers" without Senate approval.

Nonetheless, in this case the Government urges an interpretation of the FVRA that would allow the President to advance his agenda without first submitting to important constitutional prerequisites. *Amici* fear that if the President is permitted to install his chosen officers in high-level government positions without obtaining the Senate's advice and consent, it will dramatically expand the executive power—at the expense of the Constitution's carefully calibrated checks and balances—by resurrecting the very problem that Congress sought to remedy when it enacted the FVRA.

STATEMENT OF THE CASE

Although the Appointments Clause requires important government posts to be filled only by persons who are nominated by the President "by and with the Advice and Consent of the Senate," U.S. Const. art. II, § 2, Presidents from both political parties circumvented that requirement for decades by filling vacancies for such posts with replacements who would serve indefinitely in an acting capacity. To prevent the President from installing his chosen replacement without Senate approval, Congress enacted the FVRA, which provides that when a

presidentially appointed government post requiring Senate confirmation [PAS] becomes vacant, only certain individuals may temporarily perform the duties of that post in an acting capacity.

Section 3345(a)(1) of the FVRA, which establishes the default rule for filling such vacancies, provides that "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." Alternatively, the President may designate either "a person who serves in [another PAS post]" under § 3345(a)(2) or a Government employee who has worked for at least 90 days at a pay rate of GS-15 or higher under § 3345(a)(3) to temporarily perform the duties of that post in an acting capacity Section 3345(b)(1) further limits the circumstances under which a person may continue to serve as the acting officer for a vacant office after being nominated by the President to the permanent position, providing that such "a person may not serve as an acting officer for an office under this section" unless that person served as first assistant to the vacant office for at least 90 days in the year preceding the vacancy.

Under the National Labor Relations Act (NLRA), 29 U.S.C. § 153(d), the General Counsel of the National Labor Relations Board (NLRB) must be appointed by the President with the advice and consent of the Senate. Because the NLRB cannot adjudicate an unfair labor practice dispute until the General Counsel decides to issue a complaint, the General Counsel has "final authority" to prosecute unfair labor practices under the NLRA. *See* 29 U.S.C. §§ 153(d), 160(b); 29 C.F.R. §§ 102.9, 102.15.

Following Ronald Meisburg's resignation as NLRB's General Counsel in June 2010, the President directed Lafe Solomon to serve as Acting General Counsel pursuant to § 3345(a) of the FVRA. Although at that time Solomon had worked for at least 90 days at a pay rate of GS-15 or higher as required under § 3345(a)(3), he was not—nor had he ever been—the first assistant to the General Counsel. Nonetheless, on January 5, 2011, the President nominated Solomon to serve permanently as the NLRB's General Counsel. *See* Pet. App. 6. Because the Senate never acted on that nomination, it was returned to the President. *Id.* at 6a (citing 159 Cong. Rec. S17 (daily ed. Jan. 3, 2013)). Solomon served as the NLRB's Acting General Counsel from June 21, 2010, to November 4, 2013.

In January 2013, the NLRB issued an unfair labor practices complaint against Respondent SW General, Inc., an Arizona ambulance company. *See* Pet. App. 7a. Following a hearing, an administrative law judge (ALJ) concluded that Respondent violated the NLRA by discontinuing annual bonuses for certain longstanding employees—even though the collective-bargaining agreement requiring such bonuses had since expired. *Id.* at 104a. Contesting the ALJ's legal and factual findings, Respondent filed fifteen exceptions to the ALJ's decision, one of which contended that because Solomon was serving as Acting General Counsel in violation of the FVRA, the NLRB's complaint was invalid. *Id.* at 7a. Failing even to address the merits of Respondent's FVRA challenge, the NLRB adopted the ALJ's order. *Id.* at 31a-371.

On appeal, a unanimous panel of the D.C. Circuit vacated the NLRB's order. *See* Pet. App. 1a-30a. Judge Henderson (joined by Judges Srinivasan and Wilkins) held that because "Solomon was serving in violation of the FVRA when the complaint issued," the NLRB's proceeding against Respondent was *ultra vires*. Pet. App. 8a. Relying on the FVRA's text, structure, and purpose, the appeals court explained that under § 3345(b)(1), an acting officer cannot be named a permanent nominee unless "(1) he served as the first assistant to the office in question for at least 90 of the last 365 days or (2) he was confirmed by the Senate to be the first assistant." *Id.* at 11a (citing §§ 3345(b)(1)-(2)). Clarifying that § 3345(b)(1)'s limitation applies to "all acting officers," the panel concluded that "[b]ecause Solomon was never a first assistant and the President nominated him to be General Counsel on January 5, 2011, the FVRA prohibited him from serving as Acting General Counsel from that date forward." *Id.* at 20a. Consequently. the appeals court dismissed the complaint and vacated the NLRB's order. *Id.* at 30a.

The panel rejected the Government's contention that § 3345(b)(1)'s limitations apply only to first assistants who become acting officers under § 3345(a)(1). Under the Government's urged construction, § 3345(b)(1)'s introductory phrase "[n]otwithstanding subsection (a)(1)" does not impose further limits on *all* acting officers, but merely limits first assistants serving under § 3345(a)(1). *See* Pet. App. 13a. Concluding that the ordinary meaning of the word "notwithstanding" is "in spite of" rather than "for purposes of," the appeals court held that

the "notwithstanding clause" does not restrict "the ultimate scope of subsection (b)(1)." *Id.* at 14a.

The Government's petition for rehearing en banc was denied by a vote of 7-3. *See* Pet. App. 114a.

SUMMARY OF ARGUMENT

Seeking to arrest a bipartisan trend whereby Presidents would evade the Senate's advice-and-consent role by appointing acting officers who would serve permanently without Senate approval, Congress enacted the FVRA. Section 3345(b)(1) of the FVRA provides that "a person" nominated for a vacant PAS post "may not serve as an acting officer under this section" unless he has served as "first assistant" to that vacant post for at least 90 days. At bottom, this case presents a straightforward question of statutory interpretation: whether the words used in § 3345(b)(1) should be given their ordinary, common meaning, or whether they should be construed—*only* in that subsection—to have the sui generis meaning ascribed to them by the Government.

The appeals court correctly held that § 3345(b)(1)'s meaning is "clear." That is, subsection (b)(1)'s requirements apply to *all* "persons" serving as acting officers under § 3345. Had Congress desired to limit § 3345(b)(1)'s requirement solely to first assistants—as the Government contends here—it could have easily used the more specific term "first assistant" instead of "person." Instead, Congress's deliberate use of the broad and inclusive term "*a person*" clarifies that § 3345(b)(1) refers to the entire universe of possible candidates for acting officer.

Likewise, by clarifying that § 3345(b)(1)'s limitation applies to any acting officer "under this section," Congress expressly sought to limit *all* acting officers contemplated under § 3345, not merely those (*i.e.*, first assistants) authorized under subsection (a)(1).

Despite such clear language, the Government claims that § 3345(b)(1)'s broadly drafted limitation applies only to first assistants. Unsurprisingly, that self-serving interpretation significantly expands the pool of nominees who can begin work immediately as acting officers—*without* first obtaining the advice and consent of the Senate. Focusing on § 3345(b)(1)'s introductory clause—"notwithstanding subsection (a)(1)"—the Government contends that "notwithstanding" means "for purposes of," so that subsection (b)(1)'s requirements apply *only* to first assistants under subsection (a)(1).

But that conclusion does not follow from the natural, ordinary meaning of the word "notwithstanding," which means "despite" or "in spite of." The Government offers no authority for its own idiosyncratic reading, and none is available. Moreover, the word "notwithstanding" appears five times throughout § 3345, yet the Government urges its atextual meaning *only* in subsection (b)(1). The Government's construction also ignores the fact that subsection (a)(1) is the *only* provision that operates automatically, whereas subsections (a)(2) and (a)(3) do not. Thus, simply because subsection (b)(1) supersedes the automatic default provision of subsection (a)(1) does not mean that its scope is limited to that subsection.

Finally, even if the Court concludes that

§ 3345(b)(1) is ambiguous as to its proper scope, the Government's interpretation is not entitled to deference. Seeking to bolster its "longstanding" interpretation of subsection (b)(1), the Government relies on an OLC guidance document and a letter from the GAO. But because neither of those agencies is charged with administering the FVRA, binding deference under *Chevron* is simply unavailable. Regardless, even if otherwise authoritative, informal statements such as guidance documents and letters do not qualify for *Chevron* deference. And given the greater separation-of-powers concerns that gave rise to the FVRA in the first place, deference to *any* Executive Branch interpretation is entirely unwarranted.

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH THE PLAIN LANGUAGE AND STATUTORY STRUCTURE OF THE FVRA

Section 3345(b)(1) of the FVRA imposes limits on who can continue to serve as acting officer after being nominated to the permanent position, precluding from such service any "person" who did not serve as "first assistant" for at least 90 days. *See* 5 U.S.C. § 3345(b)(1). The Government contends, however, that § 3345(b)(1)'s limitations apply only to first assistants who became acting officers under § 3345(a)(1). *See* Pet. Br. at 26 ("Subsection (b)(1) of Section 3345 sets forth limits applicable only to first assistants who are serving pursuant to subsection (a)(1)—and not to PAS officials serving pursuant to subsection (a)(3)."). But, as every court to consider the question has concluded, that reading ignores not

only the plain meaning of the words Congress chose in crafting the statute, but it also ignores the context of those words in the overall statutory structure of the FVRA. This Court's principles of statutory construction do not support the Government's reading.

A. The Plain, Ordinary Meaning of § 3345(b)(1)'s Text Confirms that It Applies to *All* Acting Officers

Inquiries into the meaning of a statute must begin with the statutory language itself. This Court has "stated time and time again that courts must presume that [Congress] says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424 (1981)). Moreover, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [this Court's] precedents and that it expects its enactments to be interpreted in conformity with them." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995). Here, as the panel below unanimously concluded, the FVRA's language in § 3345(b)(1) is "clear." Pet. App. 18a.

As § 3345(a)(1) provides, when a vacancy occurs for a PAS post, "the first assistant to the office" automatically fills the vacancy as an acting officer—unless the President appoints someone else as acting officer under subsections (a)(2) or (a)(3). Regardless of who fills the vacancy as an acting

officer under § 3345(a)(1)-(3), § 3345(b)(1) then imposes further restrictions on which acting officers the President may nominate for permanent appointment. Under subsection (b)(1), "*a person* may not serve as acting officer for an office *under this section*" unless he also served as "first assistant" for at least 90 days during the prior year. 5 U.S.C. § 3345(b)(1) (emphasis added).

In construing the FVRA, the words of the statute are paramount, and those words must be given their ordinary, everyday meaning. *See, e.g.*, *United States v. Ressam*, 553 U.S. 272, 274 (2008) (relying on the "most natural reading of the relevant statutory text"); *Watson v. United States*, 552 U.S. 74, 83 (2007) (applying the "ordinary meaning and the conventions of English"); *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (looking to the "everyday" or "regular usage" in keeping with the "commonsense conception" of the term); *Smith v. United States*, 508 U.S. 223, 228 (1993) (consulting the "ordinary or natural meaning" and "everyday meaning").

Here, Congress's deliberate use of the broad and inclusive term "*a person*" clarifies that § 3345(b)(1) refers to the entire universe of possible candidates for acting officer, *i.e.*, all such persons contemplated under subsections (a)(1), (a)(2), and (a)(3). *See, e.g.*, *Gale v. First Franklin Loan Servs.*, 701 F.3d 1240, 1246 (9th Cir. 2012) (explaining that "a" has a "generalizing force" similar to "any"); Black's Law Dictionary (10th ed. 2014) (defining a "person" as "a human being"). As this Court has recognized, "the phrase 'any person'" has a "naturally broad and inclusive meaning." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 312 (1978). Surely if

Congress had intended § 3345(b)(1) to limit only first assistants who become acting officers under subsection (a)(1), it would have straightforwardly used "first assistant" rather than "a person."

Section 3345(b)(1) further provides that such a person "may not serve as acting officer for an office *under this section*," unless he also served as first assistant for at least 90 days in the preceding year. By clarifying that subsection (b)(1)'s limitation applies to any acting officer "under this section," Congress expressly sought to limit *all* acting officers contemplated under § 3345, not merely those authorized under subsection (a)(1). The Government's urged construction thus runs afoul of the "cardinal principle" of interpretation that courts "must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Again, if Congress had intended § 3345(b)(1) to limit only acting officers under subsection (a)(1), it would have used "subsection (a)(1)" instead of "this section."

Despite the clear, straightforward language Congress used when establishing the scope of subsection (b)(1), the Government asks this Court to read into the statute a highly idiosyncratic meaning that the statute's text simply cannot bear. Specifically, the Government contends that the dependent phrase "[n]otwithstanding subsection (a)(1)" at the beginning of subsection (b)(1) somehow operates to narrow (b)(1)'s scope to *only* those first assistants who become acting officers under (a)(1). *See* Pet. Br. at 28. But that conclusion simply does not follow from the ordinary or natural meaning of the word "notwithstanding." The Government cites

no authority for its unusual reading, and none is available.

Again, it is a fundamental canon of statutory construction that, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014). The word "notwithstanding" means "despite" or "in spite of." *See, e.g.*, Black's Law Dictionary (10th ed. 2014); Merriam-Webster's Collegiate Dictionary (11th ed. 2003) (defining "notwithstanding" as "without being prevented by"). So the plain meaning of "notwithstanding" as used in § 3345(b)(1) means "despite subsection (a)(1)" or "in spite of subsection (a)(1)." In contrast, under the Government's highly unorthodox reading, "notwithstanding" means "with respect to" or "for purposes of." Neither of those meanings is ordinary, contemporary, or common.

Because the first-assistant default provided in § 3345(a)(1) operates automatically, Congress used the word "notwithstanding" to ensure that (a)(1)'s default provision would not escape (b)(1)'s limit on a person's ability to serve as both the acting officer and the permanent nominee for the same vacant position. As this Court has previously recognized, "the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of *any* other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993). Thus, even if the first assistant is automatically elevated to acting officer under (a)(1), he cannot escape the limitation under (b)(1) that, in order to be eligible as the President's permanent nominee, he still must have

served as first assistant for at least 90 days in the preceding year.

But simply because (b)(1) supersedes the automatic-default provision of (a)(1) does *not* mean that it supersedes *only* (a)(1) (rather than any and all contrary provisions). *See, e.g.*, *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc) (explaining that "statutory 'notwithstanding' clauses" work to "sweep aside potentially conflicting laws"); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 127 (2012) ("[N]otwithstanding is a fail-safe way of ensuring that the clause it introduces will *absolutely, positively* prevail."). Indeed, as this Court has cogently explained in construing a similar provision in another statute: "The introductory clause ['Notwithstanding any other provision of law'] does not define the scope of [the statute]. It simply informs that once the scope of the [statute] is determined, [it applies] regardless of what any *other* provision or source of law might say." *Kucana v. Holder*, 558 U.S. 233, 238-39 n.1 (2010).[2]

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[2] The Government claims that if Congress had desired for § 3345(b)(1) to apply to all acting officers under the FVRA, it could have "provided that the limitation applies 'notwithstanding subsections (a)(1), (a)(2), and (a)(3).'" Pet. Br. at 28. But that argument improperly discounts the fact that subsection (a)(1) is the *only* provision that operates automatically, whereas subsections (a)(2) and (a)(3) do not. As the Ninth Circuit explained, "[w]ithout the 'notwithstanding' clause, confusion could easily arise as to whether (b)(1) has any force in light of the fact that the default rule exists." *Hooks v. Kitsap*, 816 F 3d 550, 560 (9th Cir. 2016).

In sum, because any other construction would require contorting the plain, ordinary meaning of the statutory text, the Court should affirm the panel's holding that § 3345(b)(1) applies to *all* acting officers under the FVRA.

B. The FVRA's Structure and Overall Scheme Confirm that § 3345(b)(1) Applies to *All* Acting Officers

As this Court has reiterated, the "ordinary meaning" of words depends on both text and context. *Sandifer*, 134 S. Ct. at 877 ("Nothing in the text or context of § 203(o) suggests anything other than the ordinary meaning of 'clothes.'"). It is therefore "a fundamental canon of statutory construction ... that the words of a statute must be read ... with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Here, the "overall statutory scheme" reinforces what the statute's plain language makes clear: that § 3345(b)(1) applies to *all* acting officers under the FVRA.

As explained previously, by clarifying that § 3345(b)(1)'s limitation applies to any acting officer "under this *section*," Congress expressly sought to limit *all* acting officers contemplated under the entirety of *section* 3345, not merely first assistants under subsection (a)(1). The overall context of § 3345 bolsters this conclusion, revealing that where Congress meant for a limitation to apply only to a particular subsection, it said so explicitly Thus, throughout § 3345, Congress deliberately used the terms "subsection," "paragraph," or "subparagraph" when referring to provisions smaller than an entire

section. *See, e.g.*, 5 U.S.C. § 3345(a)(3)(B) (referring to "subparagraph (A)"); *id.* § 3345(b)(2) (referring to "Paragraph 1"); *id.* § 3345(b)(2)(A) (referring to "subsection (a)"); *id.* § 3345(c)(1) (referring to "subsection (a)(1)"). "Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012).

Likewise, § 3345's structure further confirms that the term "*person*" in § 3345(b)(1) should be given its ordinarily broad and inclusive meaning. For example, the same term also appears in § 3345(b)(2)(A), which provides an additional exception to subsection (b)(1) for any "person [who] is serving as the first assistant to the office of an officer described under subsection (a)." But if, as the Government maintains, "a person" in subsection (b)(1) means *only* "first assistant," there would be no need for a separate exception under subsection (b)(2)(A) for any "person" serving as first assistant. In fact, the very phrase "person [who] is serving as the first assistant" would be rendered wholly redundant under the Government's reading (*e.g.*, "first assistant [who] is serving as the first assistant"). In contrast, straightforwardly construing "person" in § 3345(b)(1) to reach all acting officers avoids such redundancy altogether.

Similarly, the word "notwithstanding" appears five times throughout § 3345, yet the Government urges a meaning other than "in spite of" or "despite" only in subsection (b)(1). Construing the word "notwithstanding" in (b)(1) differently from how that same word is construed elsewhere in the statute

violates the venerable "presumption that a given term is used to mean the same thing throughout a statute." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 743 (2014). At the same time, Congress used the phrase "for purposes of" in subsection (c)(2), again confirming that it knows how to use such limiting language when it wants to.

Reading the term "notwithstanding" in § 3345(b)(1) to mean "despite" (rather than "for purposes of") avoids violating another interpretative rule that the Government seeks to disregard—the prohibition on rendering statutory language superfluous. If subsection (b)(1) limits only first assistants under subsection (a)(1), then subsection (b)(1)(A)(i)'s subsequent reference to persons who "did not serve in the position of first assistant to the office of such officer" would be nothing more than surplusage.

In sum, because the FVRA's overall statutory scheme clearly reinforces the D.C. Circuit's conclusion that § 3345(b)(1) applies to all acting officials, the decision below should be affirmed.

II. EVEN IF THE INTENDED SCOPE OF § 3345(b)(1) IS AMBIGUOUS, DEFERRING TO THE GOVERNMENT'S INTERPRETATION IS UNWARRANTED

WLF agrees entirely with the appeals court's well-reasoned conclusion that § 3345(b)(1)'s meaning is "clear." Pet. App. 18a. But even if this Court were to conclude that the statute's meaning is somehow ambiguous, the Government's interpretation would not be entitled to any deference.

Throughout its brief, the Government heaps great significance on the Executive Branch's "longstanding interpretation" of the FVRA over the past 18 years. *See, e.g.*, Pet. Br. at 13 ("From the enactment of the FVRA until the court of appeals' decision here, Presidents of both parties have made acting designations and nominations ... on the understanding that Subsection (b)(1) constrains acting service only by first assistants pursuant to Subsection (a)(1)."). Seeking further to bolster that interpretation, the Government relies on an OLC guidance document and a letter from the GAO. But whether considered under *Chevron* or otherwise, the Government's self-serving view is wholly unworthy of deference.

A. The Government's Interpretation of the FVRA Does Not Qualify for *Chevron* Deference

Consistent with *Chevron*, this Court has recognized that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865-66 (1984)). All agency interpretations, however, are not entitled to deference. In *United States v. Mead Corp.*, the Court clarified that an agency's interpretation qualifies for deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. 218, 226-

27 (2001); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000). *Chevron* deference thus comes into play only when an agency offers a binding interpretation of a statute it administers.

Here, the Government relies on an OLC memorandum that flatly asserts, without any analysis or elaboration, that § 3345(b)(1)'s limitation applies only to first assistants. *See* Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 64 (1999). The Government also cites a GAO letter to then-U.S. Senator Fred Thompson as further confirmation of its view that "Subsection (b)(1) ... appli[es] only to first assistants who serve as acting officials under Subsection (a)(1)." Pet. Br. at 15 (citing Letter from Carlotta C. Joyner, Director, Strategic Issues, to Fred Thompson, Chairman, U.S. Senate Comm. on Governmental Affairs, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, GAO-01-468R, at 2-4 (Feb. 23, 2001)). Neither of these documents merits deference.

Because neither OLC nor GAO is charged with administering the FVRA,[3] binding deference under *Chevron* is simply unavailable. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990) ("A

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[3] The Government portrays the GAO as "an instrumentality of Congress that plays a congressionally assigned role in the FVRA's enforcement." Pet. Br. at 14. But that "congressionally assigned role" is strictly limited to simply reporting violations of § 3346's 210-day time limit for acting officers. GAO has *no* congressionally assigned role with respect to § 3345.

precondition of deference under *Chevron* is a congressional delegation of administrative authority."); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (emphasizing that OLC "advisory opinions" are "not an administrative interpretation that is entitled to deference under *Chevron*."). Although agency determinations within the scope of delegated authority are entitled to deference, it is well settled "that an agency may not bootstrap itself into an area in which it has no jurisdiction." *Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

Moreover, even if the OLC or the GAO administered the FVRA—they clearly do not—informal statements such as guidance documents and letters do not qualify for *Chevron* deference. "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen*, 529 U.S. at 587; *Carter v. Welles-Bowen Realty, Co.*, 736 F.3d 722, 726 (6th Cir. 2013) ("Agency recommendations of this sort, even when cast as policy considerations or preferences, do not bind courts tasked with interpreting a statute."). And the Government's litigating position in this case (and in previous cases) is even less deserving of deference. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) ("Deference to what appears to be nothing more than [the Government's] convenient litigating position would be entirely inappropriate.").

B. Any Deference Is Inappropriate Given the Important Separation-of-Powers Concerns that Gave Rise to the FVRA

Deference (of any sort) is wholly inappropriate in this case given the larger, constitutional concerns that gave rise to the FVRA in the first place. As this Court has long recognized, the "separation of powers was not simply an abstract generalization in the minds of the Framers." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). Rather, it provides "structural protections against abuse of power," whose enforcement the Framers deemed "crucial to preserving liberty." *Free Enter. Fund*, 561 U.S. at 501.

One such indispensable structural protection is the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, which checks executive power by requiring the President to obtain "the Advice and Consent of the Senate" *before* appointing officers of the United States. After Presidents from both political parties routinely flouted that requirement, Congress passed the FVRA to prevent the President from circumventing Senatorial prerogatives. Yet if the Executive Branch is permitted to interpret the FVRA entirely as it sees fit—by receiving deference from this Court—then the very structural protections guaranteed by the Appointments Clause and fortified by the FVRA will be rendered illusory. "This Court does not defer to the other branches' resolution of such controversies." *Nat'l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550, 2593 (2014).

That is why the Court has steadfastly refused to defer to *any* of the political branches on questions affecting the separation of powers. In *Clinton v. New York City*, 524 U.S. 417 (1998), for example, the Court evaluated the constitutionality of the line-item veto without ever expressing the need to defer to the other branches' judgments. And in *Morrison v. Olson*, 487 U.S. 654 (1988), Justice Scalia noted that he could "not find anywhere in the Court's opinion the usual, almost formulary caution that we owe great deference to Congress' view that what it has done is constitutional." *Id.* at 704-05 (Scalia, J., dissenting). More recently, in *Free Enterprise Fund*, the Court emphasized that "the separation of powers does not depend on the views of individual Presidents, nor [even] on whether 'the encroached-upon branch approves the encroachment.'" 561 U.S. at 3155 (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)).

The lack of deference to both executive and legislative judgments on these issues flows from the recognition that "separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878-79 (1991) ("[W]e are not persuaded by the [Government's] request that this Court defer to the Executive Branch's decision that there has been no ... encroachment on ... prerogatives under the Appointments Clause."). That same concern should animate the Court's approach to statutory construction in this case, where deferring to the Petitioner's view of § 3345(b)(1) could stop it from preventing the Executive Branch from "aggrandizing its power at the expense of another branch," or

ensuring that "the carefully defined limits on the power of each Branch" are not eroded. *INS v. Chadha*, 462 U.S. 919, 957-58 (1983).

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In sum, because the Government's interpretation of § 3345(b)(1) is not entitled to deference, the Court should affirm the panel's holding below.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court affirm the decision below.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

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